ment as if the money had come from their own pockets, and there was no need for respondents to undertake to refund such sum to the provider as the plaintiff had to do under the different circumstances of *Schneider* v. *Eisovitch*,[1] in order to be entitled to recover. We therefore feel that in the special circumstances, both sums awarded should remain unaltered.

What we hold here should not be seized upon as authority for the proposition that a whole family should be entitled to claim air fare to accompany an injured member to another country for medical treatment. This cautionary note finds support in *Kemp & Kemp* Vol. 1 4th Edition at page 112 where it is said: "No useful purpose would be served by citing an extended list of cases in which particular types of expense have been held to be recoverable. In every case the court must decide whether it would be reasonable to incur the particular expense; that is a question of fact and degree to be determined on the facts of the particular case."

The appellants also say that the sum of $65,000 awarded for the expenses of special schooling is far too much, and that even if Allison had gone to a state school where she would have gone but for the accident, expenses would be involved. It was suggested that 50% be deducted from the sum awarded, without reason being advanced for, or calculations provided to support such drastic reduction.

Counsel for appellants is clearly in error in suggesting that there is no evidence that there are special schools which can benefit cases of this sort.

Miss Studebaker, consultant in learning disorders called by the respondents, recommended specialised schooling for Allison. This witness said that Allison needed a teacher who could react to her in a special way, because her performance was slow and she would not be able to attain achievements at the rate of her peers.

Another witness, the Principal of the Alice Smith School where Allison had been for one term before the accident, and to which she returned for a spell afterwards, and who was therefore in a position to note a change for the worse, also was of the view that Allison would need special education for some time.

Harris v. *Harris*[2] was cited as an instance where a school girl who had suffered brain injury was given an award of extra school fees for transfer to a public school after her accident, her pre-injury school having been found no longer suitable.

It is common knowledge that state schools in the United Kingdom do not charge school fees. The learned trial judge had accepted Allison's father's testimony that on his return to U.K. at the completion of his present contract, all the children, including Allison had she not been affected by the accident, would continue their education in state schools, because the expense of a public school was beyond his means. Whilst there were state schools catering for mentally subnormal children he testified Allison was not mentally retarded, but a girl of average intelligence who as a result of the accident has a severe learning difficulty. He found just such a public school (see Exhibit P7) where the fee was £645 per term.

Mr. Khoo, in urging a reduction in the figure of the award, cited the case of *Fletcher* v. *Autocar & Transporters Ltd.*,[3] based on the principle that in assessing additional expenses all economies consequent on the action taken that involved the expenses claimed should be brought into consideration.

With respect, it is clear that the learned trial judge has not overlooked that principle. With inflation pushing up school fees, and there is evidence at the trial to that effect, the £650 per term of his award may seem modest, as at the end of seven years Allison would normally be expected to remain in school.

It would not be amiss to repeat what Lord Wright said in *Davies* v. *Powell Duffryn Associated Collieries Ltd.*[4]:

"Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases. but a good general guide is given by Greer L.J. in *Flint* v. *Lovell* [1935] 1 K.B. 354. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

We would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Adlan & Hj. Suhaimi; Shearn Delamore & Co.*

MUHARAM BIN ANSON v. PUBLIC PROSECUTOR

[F.C. (Seah Ag. C.J. (Borneo), Chong Siew Fai & Wan Mohamed JJ.) December 1, 1980]

[Kota Kinabalu — Federal Court Criminal Appeal No. 14 of 1980]

Criminal Law and Procedure — Mischief by fire — Evidence of visual identification — Discretion of prosecution in calling witnesses — Evidence of child for defence — Sentence — Penal Code, s. 436.

The appellant had been convicted of the offence of mischief by fire in that he set fire to a dwelling house intending to cause the destruction of the building. On appeal it was argued that (a) as the evidence against the appellant depended on the visual evidence of identity by the complainant and his wife there was the possibility that the appellant had been wrongly identified; (b) that the prosecution had failed to call the son of the complainant at the trial; (c) that the learned trial judge had failed to accept the testimony of the child of the appellant who gave evidence for the defence; (d) that the sentence of six years' imprisonment was excessive.

Held: (1) the learned trial judge had subjected the testimonies of the complainant and his wife to close scrutiny. This was more a case of recognition than of identification and the learned trial judge was justified on the evidence in holding that it was the appellant who had wilfully set fire

to the dwelling house of the complainant intending to cause its destruction;

(2) the prosecution has a discretion as to what witnesses should be called for the prosecution and the court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive. The son of the complainant could not be found and in the absence of any submission by counsel for the appellant that the prosecutor had not exercised his discretion *bona fide*, there was no merit in the contention that the son of the complainant should have been called as a witness at the trial;

(3) the learned trial judge was justified in rejecting the evidence of the child of the appellant as she was about seven years at the time of the incident and gave unsworn evidence at the trial;

(4) the period of detention of the appellant should have been taken into account and the sentence should be reduced from six years to five years.

Cases referred to:-

(1) *Arthurs* v. *Attorney-General for Northern Ireland* [1971] 55 Cr. App. R. 161.

(2) *Adel Muhammed El-Dabbah* v. *Attorney-General for Palestine* [1944] A.C. 156.

(3) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105.

(4) *Samsudin* v. *Public Prosecutor* [1962] M.L.J. 405.

FEDERAL COURT.

Datuk Herman Luping for the appellant.

Abdul Gani Patail (Deputy Public Prosecutor) (*Harani bin Mohamed Noor* with him) for the respondent.

Seah Ag. C.J. (Borneo) (delivering the judgment of the Court): The appellant, Muharam bin Anson was convicted by the Kota Kinabalu High Court of the offence of mischief by fire, in that he set fire to a dwelling house belonging to Liaw Teck intending to cause the destruction of such building ordinarily used as a human dwelling contrary to section 436 of the Penal Code and was sentenced to six years' imprisonment as from November 29, 1978. He now appeals to the Federal Court against both conviction and sentence.

Originally the appellant was charged jointly with his son, Laiya bin Muharam under section 436 of the Penal Code read together with section 34 of the same Code. However, at the close of the prosecution case the learned trial judge ruled that a *prima facie* case had not been made out against the son which if unrebutted, would warrant his conviction and he was accordingly discharged and acquitted.

The short facts, so far as they are necessary for this appeal are that on the night of September 28, 1977 the dwelling house of Liaw Teck, a resident of Kampong Takuli, Beaufort, Sabah, was deliberately burnt down and it was the prosecution case that the appellant and his son wilfully set it on fire. There was apparently no dispute as to the main facts and the only issue in controversy related to the identity of the person or persons who intentionally set fire to the dwelling house.

At the trial Liaw Teck testified that he saw the face of the appellant by means of a torchlight and he thought the other person who was with the appellant was his son, Laiya. The testimony of Liaw Teck, the principal prosecution witness, was supported by his wife, Yuen Chew Lee. Both Liaw Teck and the appellant had had been neighbours for more than ten years albeit they did not appear to be on speaking terms at the material time.

In *Arthurs* v. *Attorney-General for Northern Ireland*[1] the Court of Criminal Appeal in Northern Ireland formulated the following question involving a point of law of general public importance for the consideration of the House of Lords and the question reads:

"When, in the course of a trial on indictment, a conviction appears to depend wholly or substantially on the visual identification of the accused by one or more than one witness, is it in law the duty of the presiding judge to give a general warning to the jury of the dangers of acting on such evidence?"

Lord Morris of Borthy-Gest, who gave the leading opinion of the House, with which the other members also concurred, said at page 168:

"Where conviction will involve the acceptance of the challenged evidence of one or more witnesses in regard to identification, a summing-up would be deficient if it did not give suitable guidance in regard to identification. The circumstances of individual cases will, however, greatly differ. Thus there may be cases in which a witness can say that at a certain place and time he saw and clearly recognised the accused person. If the accused person was someone who was well known to him or at least was well known to him by sight and if the conditions at the relevant time were such that there was nothing to impede or to prevent recognition or to make recognition difficult, then a jury would mainly have to consider whether the witness was both truthful and dependable. In the present case the police constable knew the accused well. There was no dispute as to that. It was for the jury to decide not only whether the police constable was a truthful witness but also whether the conditions which existed at the time when the police constable claimed to have seen and recognised the accused were such that a mistake might have been made.... There will, however, be some cases where the situation is very different. I refer to cases where a witness has seen someone whom he does not in any way know and has had over a period of time to carry in his mind's eye a recollection of the person and then is at some later date asked (either at an identification parade or at some place) to say whether he can recognise the person whom he previously saw. In such a situation it is manifest that dangers may result from human fallibility. I would leave for future consideration the question whether there is need to lay down any rule for the guidance of courts in such cases...."

Although Liaw Teck was about 70 years of age and his wife, Yuen Chew Lee was approximately 50 years old at the time of the incident, the learned trial judge said that both appeared to be mentally alert and physically strong when they gave their evidence before him. Both impressed the learned trial judge as truthful witnesses. The learned trial judge said that when Liaw Teck was asked whether he saw the face of the other person who was with the appellant that night he stated without hesitation that he did not see the other person's face. He merely guessed that he was the son of the appellant. Yuen's testimony was that though she saw the faces of the two men that night she only saw the appellant's face clearly. The learned trial judge explained that both Liaw Teck and his wife could have easily said that they saw the face of the other person clearly and identified him as that of Laiya but they did not do so.

Turning to the question of the possibility that the appellant might have been wrongly identified by both Liaw Teck and his wife the learned trial judge said at page 4 of his judgment:

"In dealing with evidence of visual identification the court has to remind itself of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The offence, in this case, was committed at night and the two witnesses saw the accused for no more than a few seconds. However, when these two witnesses saw the face of the 1st accused they were only about 15 feet to 18 feet away from him and PW1 (Liaw Teck) flashed the torchlight on the face of the 1st accused who was known to them as a neighbour for more than 10 years. This was more a case of recognition than mere identification. Both witnesses said that they were sure that it was Muharam who came to their house. According to ASP Terence Wong (PW6) when he arrived at PW1's house (later that night) PW1 appeared to be very sure when he said that it was Muharam who set fire to the house. After careful consideration of all the circumstances surrounding this case and the demeanour of the witnesses I was satisfied beyond reasonable doubt that it was the 1st accused who came and set fire to Liaw Teck's house."

Having regard to the observations of Lord Morris in *Arthurs'* case we think the learned trial judge had properly subjected the testimonies of Liaw Teck and his wife to close scrutiny. After doing that we agree with the view of the learned trial judge that this was more a case of recognition than mere identification. On the evidence adduced before the court we also agree with his conclusion that it was the appellant who wilfully set fire to the dwelling house of Liaw Teck that night intending to cause its destruction.

Counsel for the appellant next complained that Liaw Teck's son, Liaw Hon Khin, who was present in the house at the material time and who gave evidence at the preliminary inquiry for the prosecution was not called as a witness at the trial. Counsel argued that Liaw Hon Khin was an important prosecution witness and he admitted that his testimony could have corroborated further the evidence of his parents. It was further submitted that the learned trial judge ought to have adjourned the trial for him to be called. In the case of *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine*[2] the Privy Council held that the prosecution has a discretion as to what witnesses should be called for the prosecution and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive. This *dictum* was applied by the Court of Appeal in *Khoon Chye Hin* v. *Public Prosecutor*[3] and *Samsudin* v. *Public Prosecutor.*[4]

It should, however, be noted that at the trial the Deputy Public Prosecutor had informed the court that the son, Liaw Hon Khin, could not now be found and he was listed as a missing person by the police. In the absence of any submission by counsel for the appellant that the Deputy Public Prosecutor had not exercised his discretion *bona fide,* we find that there is no merit in this contention of counsel for the appellant.

Lastly, it was submitted by counsel for the appellant that the learned trial judge was biased against Kunah binti Muharam and that he was wrong in not accepting her testimony that the appellant was at home when Liaw Teck's house caught fire. Kunah (*f*) was ten years old at the time of the trial and about seven years of age at the time of the incident. After holding an inquiry, the learned trial judge received her unsworn evidence after forming the opinion that Kunah (*f*) did not understand the nature of an oath but thought she possessed sufficient intelligence to justify the reception of her evidence and understood the duty of speaking the truth. The testimony of Kunah (*f*) in the examination-in-chief consisted of five sentences and they are as follows:

"On September 28, 1977 at 7.30 p.m. the 1st accused was in the house. We were having our meals. I heard gunshots. I heard 3 gunshots. My father was in the house."

In response to questions put by the Deputy Public Prosecutor Kunah (*f*) said (at page 19 of the record):

"In 1977 I could not tell the time by looking at a clock or watch. I can tell the time now. I cannot remember on what date Liaw Teck's house was on fire at 7.30 p.m."

When asked by the learned trial judge how she could tell that Liaw Teck's house caught fire Kunah (*f*) did not give a reply. However, afterwards she was recorded to have said:

"I saw fire. I did not know it was Liaw Teck's house that was on fire."

On the basis of this evidence the learned trial judge said (at page 6 of his judgment):

"I had no doubt that DW2 (Kunah (f)) was taught by someone what to say in court."

We consider the learned trial judge was justified in coming to this conclusion. Under the circumstances, we reject the suggestion of counsel for the appellant that the learned trial judge was biased against Kunah binti Muharam. With respect, we are of the view that this attack on the learned trial judge is wholly unjustified and totally misconceived. Having dismissed the testimony of the daughter the learned trial judge had no alternative but to reject the defence of the appellant. It follows that we affirm the conviction of the appellant under section 436 of the Penal Code.

We turn now to consider the appeal against the sentence of six years' imprisonment. In sentencing the appellant, the learned trial judge said: "Sentence to run from date of his detention on 29.11.78".

Counsel for the appellant had argued that the sentence was unduly harsh having regard to the circumstances of the case. For the Public Prosecutor it was submitted that the sentence should not be disturbed.

At the appeal it transpired that the appellant was first arrested on September 28, 1977 when he was remanded till released on court bail on January 11, 1978. However, after the conclusion of the preliminary inquiry when the appellant was committed for trial in the High Court it seems that his bail was revoked and he was remanded in custody on November 29, 1978 till his trial. The learned trial judge was misled into thinking that he was under detention since that date when the appellant said that he was kept in prison since November 29, 1978. When the learned trial judge imposed the sentence of six years' imprisonment to take effect from November 29, 1978 he did not appear to know that the appellant had already been remanded for about three and half months from September 28, 1977 to January 11, 1978. In our view this period of detention, brief though it may appear, ought to have been taken into account by the learned trial judge for the purpose of passing

sentence. Apart from this we are of the view that the learned trial judge had taken into consideration all the relevant factors. Accordingly, we would reduce the sentence from six to five years' imprisonment to take effect from November 29, 1978.

It follows that the appeal against conviction is dismissed but we allow the appeal against sentence to the extent as above stated.

Appeal dismissed.

Solicitors: *Luping & Co.*

SIO KOON LIN & ANOR. v. S.B. MEHRA

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.J.) March 11 & December 5, 1980]
[Kuala Lumpur — Federal Court Civil Appeal No. 211 of 1978]

Partnership — Partner withdrawing from partnership — Return of contribution — Provision for payment by instalments — Claim for full amount — Instalment not due.

Practice and Procedure — Claim for return of money — Money to be repaid by instalments — Amendment of writ — Effect of — Limitation — R.S.C. 1957, O. 28, r. 2.

The respondent had contributed $100,000 to a partnership and it had been agreed that this amount be repaid to him, $15,000 on the execution of the agreement, $35,000 on or before October 12, 1972 and the balance of $50,000 by monthly instalments of $10,000 on the 12th day of each succeeding month. There was no provision that in the case of default of any one instalment, the remaining instalments should become immediately due and payable. On October 7, 1972 the respondent took out a writ claiming *inter alia* payment of the sum of $85,000 with interest. This writ was subsequently amended on October 14, 1972 and a new prayer was added for the payment of any sum found due on the taking of accounts. The learned trial judge gave judgment for the respondent and the appellants appealed.

Held: (1) the respondent did not on October 7, 1972 have any cause of action in respect of the $85,000 or any part thereof, as no instalments were then due;

(2) the amendment to the writ dated back to the date of the original issue of the writ and at that date even the first instalment of $35,000 was not due.

Cases referred to:-

(1) *Eshelby* v. *Federated European Bank* [1932] 1 K.B. 254; [1932] 1 K.B. 423 C.A.

(2) *Sneade* v. *Wotherton etc. Co.* [1904] 1 K.B. 295.

FEDERAL COURT.

A.K. Bashir for the appellants.

V. Krishnan for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The 1st appellant and the respondent, since deceased, (but for convenience we will continue to treat him as the respondent to the appeal), intended to form a limited company to be known as Kingwood Timber Industries Sdn. Bhd. and commenced trading even before the registration, as in the statement of claim, with the Registrar of Businesses. The monetary contribution made by the respondent was $100,000, which must be a considerable sum for a retired military officer. Later, without the knowledge of the respondent, the 1st appellant and the 2nd appellant formed a partnership. It dealt substantially with the same lines as the company and was given the same name Kingwood Timber Industries. There can be no doubt about the significance of the dual parts played by the appellants. Even to this military officer, the significance was clear when he found out the existence of the partnership business. The statement of claim referred to unhappy differences arising from this discovery. Whatever the real state of the affairs between them, the respondent then desired to withdraw from the business. He accordingly entered into another agreement with the 1st appellant on September 14, 1972. There were other agreements subsequently, but the agreement of September 14, 1972 was the one sued on.

The first recital acknowledged the respondent's contribution of $100,000 to the working capital of the company. The second referred to the registration of the appellants as partners of the company. This recital, though drafted by qualified practitioners, is wrong in law and in fact. The appellants had registered themselves as partners of a partnership business under the Registration of Businesses Ordinance and not under the Companies Act. The third recital referred to the agreement for the assignment of all of the respondent's rights in the company to the 1st appellant in consideration of the return of the capital contribution of $100,000 and a half share of the profits of the company from June 8, 1972 when presumably the company commenced trading to September 30, 1972. The document was to give effect to the agreement in the third recital. The profits anticipated in the agreement were enormous.

Of the several provisions in the agreement, we need concern ourselves strictly with the one relating to the return of the $100,000. A sum of $15,000 was paid on the execution, leaving $85,000 to be paid by future instalments. $35,000 was to be paid on or before October 12, 1972 and the balance of $50,000 was to be paid by monthly instalments of $10,000 on the 12th of each succeeding month. There is not the ordinary provision that in the event of default in the payment of any one instalment, the remaining instalments shall become immediately due and payable (this is yet again another example of the effect of having the same solicitor draft agreements between parties with conflicting interests). The other provisions are concerned with the ascertainment of the profits. For this purpose the respondent was to have access to the company's books.

On October 7, 1972, the respondent took out a writ against the partners of Kingwood Timber Industries. The distinction between the company in which the respondent had invested and the partnership entered into by the appellants was so vague that though the agreement sued on was between the respondent and the 1st appellant, no point was taken on the liability of the 2nd appellant under the agreement. The first statement of claim referred to the facts which have been set out leading to the discovery by the respondent of this partnership business and to the September agreement. It next referred to the refusal of the appellants to give access to the books for the determination of the profits, a half share of which for the period in the agreement was given to the respondent. It then asked for (i) judgment against the 1st appellant for $85,000 with interest, (ii) delivery of the account books, (iii) appointment of a receiver,